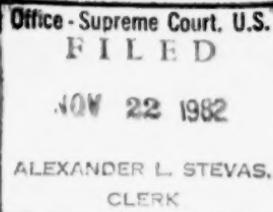


82 - 907

NO. \_\_\_\_\_



IN THE SUPREME COURT  
OF THE UNITED STATES

October Term, 1982

STATE OF NORTH CAROLINA

Petitioner, Respondent

v.

TRAVIS HICKS PROCTOR

Respondent, Petitioner

On Writ of Certiorari to the  
North Carolina Court of Appeals

PETITION FOR CERTIORARI - CRIMINAL CASE

Roger W. Smith, Counsel of Record  
Tharrington, Smith & Hargrove  
P. O. Box 1151  
Raleigh, North Carolina 27602  
Telephone: (919) 821-4711

QUESTION PRESENTED

May a state convict a defendant  
pursuant to a criminal statute that does  
not prohibit the conduct charged?

NO. \_\_\_\_\_

---

IN THE SUPREME COURT  
OF THE UNITED STATES

---

October Term, 1982

---

STATE OF NORTH CAROLINA  
Petitioner,  
v.

TRAVIS HICKS PROCTOR,  
Respondent.

---

On Writ of Certiorari to the  
North Carolina Court of Appeals

---

PETITION FOR CERTIORARI - CRIMINAL CASE

---

The Petitioner, Travis Hicks Proctor,  
respectfully prays that a Writ of Certiorari  
issue to review the judgment and opinion of  
the North Carolina Court of Appeals entered  
in this proceeding on August 17, 1982, and the  
Order of the Supreme Court of North Carolina,  
denying review, entered on September 22, 1982.

TABLE OF CONTENTS

Table of Authorities . . . . .	iv
Opinion Below . . . . .	1
Jurisdiction . . . . .	1
Constitutional and Statutory Provisions . . . . .	2,3,4
Statement of the Case . . . . .	5
Argument . . . . .	10
Conclusion . . . . .	19
Certificate of Filing . . . . .	20
Certificate of Service . . . . .	21
Appendices	
A.    Opinion of N. C. Court of Appeals. . . . .	A1
B.    Order of Supreme Court of N. C. . . . .	A15

TABLE OF AUTHORITIES

CASES

<u>Coates v. Cincinnati</u> , 402 U.S. 544 (1971) . . . . .	15
<u>Hynes v. Oradell</u> , 425 U.S. 610 (1976) . . . . .	14
<u>Palmer v. Euclid</u> , 402 U.S. 544 (1971) . . . . .	15
<u>Papachristou v. Jacksonville</u> , 405 U.S. 156 (1972) . . . . .	15
<u>Smith v. Goguen</u> , 415 U.S. 566 (1974) . . . . .	14
<u>Wright v. Georgia</u> , 373 U.S. 284 (1963) . . . . .	15,16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV . . . . .	Passim
----------------------------------	--------

STATUTES

N.C.G.S. §90-90(a)4 . . . . .	11,14,17
N.C.G.S. §90-95(a)(1) . . . . .	17
N.C.G.S. §90-95(b)(1) . . . . .	17
N.C.G.S. §90-95(h)(3) . . . . .	10,12,13, 17

OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported in \_\_\_\_ N.C. App.\_\_\_\_, 294 S.E. 2d 240 (1982). The Order of the Supreme Court of North Carolina, denying Petitioner's Petition for Discretionary Review, is reported in \_\_\_\_ N.C.\_\_\_\_, \_\_\_\_ S. E. 2d \_\_\_\_ (1982).

JURISDICTION

The decision of the North Carolina Court of Appeals was entered on August 17, 1982. Petitioner's Petition for Discretionary Review was denied by the Supreme Court of North Carolina in an Order filed on September 22, 1982, and this Petition for a Writ of Certiorari was filed within sixty (60) days of that date. The sixtieth day was Sunday, November 21, 1982, and this Petition was filed on Monday,

November 22, 1982. This Court's  
jurisdiction is invoked under 28 U.S.C.  
§1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution,  
Amendment XIV; §1. All person born or  
naturalized in the United States, and  
subject to the jurisdiction thereof, are  
citizens of the United States and of the  
state wherein they reside. No state shall  
make or enforce any law which shall  
abridge the privileges or immunities of  
citizens of the United States; nor shall  
any state deprive any person of life,  
liberty, or property, without due process  
of law; nor deny to any person within its  
jurisdiction the equal protection of  
the laws.

STATUTORY PROVISION INVOLVED

North Carolina General Statute

**S90-95(h) (3):** Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000);

- b. Is 200 grams or more, but less than 400 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than one hundred thousand dollars (\$100,000);
- c. Is 400 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred fifty thousand dollars (\$250,000).

STATEMENT OF THE CASE

By an indictment returned on September 29, 1980, Petitioner was charged by a Wilson County, North Carolina, Grand Jury with the felony of trafficking in cocaine in violation of North Carolina General Statute §90-95(h) (3).

Prior to trial, Petitioner moved for a Bill of Particulars, requesting that the State identify the specific substance in which the Petitioner was alleged to have trafficked. (Record pages 4-8). The State responded that the substance in question was "a derivative of coca leaves." (R.pp. 8,9).

Thereafter, prior to trial, Petitioner filed a written motion to dismiss the charge on the ground that the statute, as applied to Petitioner, was unconstitutional in that it did not prohibit trafficking in "a derivative of coca leaves." (R.p. 9).

Following a hearing on this motion, the Court found that the statute did include a prohibition against trafficking in "a derivative of coca leaves." It concluded, therefore, that the statute was not unconstitutional." (R.pp. 10, 11).

The case came on for trial at the June 15, 1981, Criminal Session of Wilson County, North Carolina, Superior Court. Prior to Jury Selection, the Petitioner renewed his motion to dismiss and it was again denied. (R.p. 12). During the trial, the State's chemist testified that the substance in question was "a derivative of coca leaves." (Transcript page 198, Appellant's Brief Appendix E). Following this testimony, the Petitioner again moved to dismiss. The motion was denied. (R.pp. 13, 14).

Following the arguments of counsel and instructions by the Court, the Jury returned a verdict finding the Petitioner guilty as

charged. The Court then entered judgment sentencing the Petitioner to a prison term of eighteen to twenty-five years and the payment of a fine in the amount of \$250,000.00.

The Petitioner gave Notice of Appeal to the North Carolina Court of Appeals. In the Record on Appeal to that Court, the Petitioner's Assignments of Error included the following:

ASSIGNMENT OF ERROR NO. 1

That the Court erred in denying defendant-appellant's motions, made before and during trial, to dismiss the charge of trafficking in cocaine on the grounds that G.S. 90-95 (h) (3) is unconstitutional on its face or as applied to the defendant-appellant for vagueness.

EXCEPTIONS NOS. 2 (R.p. 11); 3 (R.p. 12); 7 (R.p. 14); 8 (R.p. 15); 9 (R.p. 16); 15, 16 (R.p. 17); 17 (R.p. 18).

ASSIGNMENT OF ERROR NO. 2

That the Court erred in denying defendant-appellant's motions,

made before and during trial, to dismiss the charge of trafficking in cocaine on the grounds that G.S. 90-95(h)(3) is unconstitutional on its face or as applied to the defendant-appellant in that "a derivative of coca leaves", as stated by the State in its Answer: Bill of Particulars, is not included within the confines of said statute.

EXCEPTIONS NOS. 2 (R.p. 11); 3 (R.p. 12); 7 (R.p. 14); 8 (R.p. 15); 9 (R.p. 16); 15, 16 (R.p. 17); 17 (R.p. 18).

(R.p. 39, 40).

The North Carolina Court of Appeals, in an opinion filed on August 17, 1982, met the issue raised by the Assignments of Error head-on. The Court agreed that the trafficking provision of the North Carolina Controlled Substances Act does not include a derivative of coca leaves among the substances covered by the trafficking provisions. The Court concluded, however, that the omission of this substance was a legislative oversight. Thus, it held that the full definition of cocaine from the non-trafficking provisions of the Act should

be read into the trafficking provisions of the Act. Accordingly, the Petitioner's conviction was affirmed.

Within the time prescribed by the North Carolina Rules of Appellate Procedure, the Petitioner filed, on September 3, 1982, a Petition for Discretionary Review with the Supreme Court of North Carolina. As a part of that Petition, the Petitioner raised the issue contained in Assignments Numbers One and Two of the Record on Appeal in the North Carolina Court of Appeals: whether the cocaine trafficking statute applied to "a derivative of coca leaves" despite the fact that the statute did not, in its terms, contain any references to that substance.

By an Order filed on September 22, 1982, the Supreme Court of North Carolina denied the Petition without opinion.

## ARGUMENT

The decision of the North Carolina Court of Appeals is appropriate for review by this Court because it is in conflict with decisions of this Court.

The Petitioner was convicted of the sale and delivery of 454 grams of "a derivative of coca leaves" in violation of N.C.G.S. §90-95(h)(3). Petitioner was punished by imprisonment and fine pursuant to that provision.

That provision of the law, however, does not apply to a substance that is "a derivative of coca leaves." It applies only to "coca leaves" or their chemical equivalent. N.C.G.S. §90-95(h)(3).

The absence of coca leaf derivatives from the operation of the trafficking provisions can best be seen in the context of the other provisions of the Controlled Substance Act, contained in Article 5 of

Chapter 90 of the North Carolina General Statutes. The general (non-trafficking) provisions of the Act divide substances into six Schedules, proscribe acts in relation to the acts and the Schedules. The substances are defined within the Schedules. Schedule II includes the following:

Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances

• • •

N.C.G.S. §90-90(a)4. Analysis of this definition reveals that it includes three types of substances:

Type 1. Coca leaves; and

Type 2. Salts, compound, derivative, or preparation of coca leaves; and

Type 3. Salt, compound, derivative, or preparation that is chemically equivalent or identical.

Effective July 1, 1980, the North Carolina General Assembly added a new trafficking subsection to Section 95 of the Controlled Substance Act. N.C.G.S. §90-95(h). This new subsection (h) provides increased punishment for trafficking in four general types of substances. Unlike the general (non-trafficking) provisions of the Act, however, the trafficking subsection does not prohibit acts and prescribe penalties with respect to specific substances that are named and defined in the trafficking subsection itself. The trafficking subsection contains the following sub-section:

Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical. . . .

N.C.G.S. §90-95(h)(3). It is

immediately apparent that this definition is not the same as that set forth in Schedule II as part of the general (non-trafficking) provisions of the Controlled Substances Act. The trafficking definition includes only two of the three types of substance that are included in the definition found in Schedule II. It does not include the second type of substance that is a part of the Schedule II definition. Analyzed, then, the trafficking definition includes these substances:

Type 1. Coca leaves; and

Type 2.

Type 3. Any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical.

The Petitioner, then, has been convicted and sentenced for trafficking in "a derivative of coca leaves" in violation of N.C.G.S. 90-95(h)(3). By its terms, however, that subsection does not

prohibit trafficking in "a derivative of coca leaves."

The North Carolina Court of Appeals agreed that the trafficking subsection does not include coca leaf derivatives among its substances. The Court concluded, however, that the omission was a legislative oversight. Thus, it held, "the full definition of cocaine in G.S. 90-90(a)(4) may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3)."

This conclusion by the North Carolina Court of Appeals is in conflict with decisions of the United States Supreme Court which held that Due Process requires that a criminal statute give adequate notice that the conduct charged is prohibited. See, e.g., Hynes v. Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974);

Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Palmer v. Euclid, 402 U.S. 544 (1971); Wright v. Georgia, 373 U.S. 284 (1963).

In Palmer v. Euclid, *supra*, a city ordinance made it a crime for a person to wander about, with no visible or lawful business, and with no satisfactory account of himself. The defendant was convicted after he was observed, late at night, letting a female out of his car, parking with his lights on, talking on a two-way radio, and giving contradictory explanations of his conduct. The Supreme Court reversed, finding that the ordinance gave insufficient notice to the average person that conduct such as the defendant's was within the purview of the statute. Similar ordinances were held to be constitutionally infirm in Papachristou v. Jacksonville, *supra*, and Coates v.

Cincinnati, supra.

In Wright v. Georgia, supra, six young black men were convicted of violating a state statute that prohibited congregating for the purpose of disturbing the peace and failing to disperse upon being ordered to do so. The evidence was that the defendants were peacefully playing basketball in the park. The Supreme Court reversed, finding that the defendants could not have had notice that their conduct was prohibited by the statute in question.

The Court held:

It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process.

Id. at 293.

In the present case, the average person, including the Petitioner, had adequate notice that the sale and delivery of 454 grams of "a derivative of coca leaves"

was a violation of N.C.G.S. §90-95(a)(1). That section prohibits the sale and delivery of a controlled substance. A derivative of coca leaves is declared a controlled substance by N.C.G.S. §90-90 (a)4. A violation of that section is a felony punishable by a maximum term of imprisonment of ten years and a maximum fine of \$10,000.00. N.C.G.S. §90-95(b)(1). However, no person could have adequate notice that the sale and delivery of 454 grams of "a derivative of coca leaves" would be a violation of the trafficking provisions of the Act and, therefore, subject to imprisonment for 16 to 40 years in prison and a minimum fine of \$250,000.00. N.C.G.S. 90-95(h)(3). That section simply does not include "a derivative of coca leaves" as a prohibited substance.

The present case, then, presents the unique situation where state courts have

simply inserted words in a statute to cover for what is referred to as "legislative oversight." Surely legislative oversight cannot be a constitutionally proper basis for a court to make criminal that which the legislature failed to make criminal.

Consideration and determination of this issue by this Court is important to reaffirm the principle that a citizen is entitled to notice that conduct is prohibited before he engages in that conduct.

CONCLUSION

For the reasons stated, and upon the authorities cited, the Petitioner respectfully contends that a Writ of Certiorari should issue to review the judgment and opinion of the North Carolina Court of Appeals.

Roger W. Smith

Roger W. Smith, of  
THARRINGTON, SMITH & HARGROVE  
Counsel for Petitioner  
Suite 300 BB&T Building  
Post Office Box 1151  
Raleigh, North Carolina 27602  
Telephone: (919) 821-4711

CERTIFICATE OF FILING

I certify that I filed the foregoing Petition for a Writ of Certiorari in the United States Supreme Court by depositing a copy thereof in an official depository of the United States Postal Service in a package on which first class postage had been prepaid, addressed to The Clerk, United States Supreme Court, Washington, D.C. 20543.

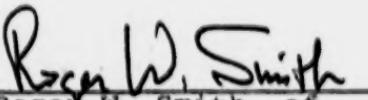
This the 22nd day of November, 1982.

Roger W. Smith  
Roger W. Smith, of  
THARRINGTON, SMITH &  
HARGROVE  
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I served the foregoing Petition for a Writ of Certiorari on the State of North Carolina by depositing a copy thereof in an official depository of the United States Postal Service in a first class postage prepaid envelope addressed to Douglas A. Johnson, Assistant Attorney General, North Carolina Department of Justice, Justice Building, Raleigh, North Carolina.

This the 22nd day of November, 1982.

  
\_\_\_\_\_  
Roger W. Smith, of  
THARRINGTON, SMITH &  
HARGROVE  
Counsel for Petitioner